Supreme Court, U.S.
FILED

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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

ALAYNE BARRY ADAMS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court (Robert M. McRae, Jr.) erred as a matter of law in failing to recuse himself from the case of U.S.A. v. Adams and Coiner[1] after the case was remanded by the Sixth Circuit Court of Appeals for further proceedings, after said judge made certain remarks to the effect that defendant Adams was guilty regardless of the technicality resulting in reversal of her convictions of perjury.

II. Whether the trial court erred as a matter of law in placing the burden of proof on the issue of vindictive/ selective prosecution on the defendants.

III. Whether the trial court erred as a matter of law in determining that no vindictive/selective prosecution occurred in the instigation and prosecution of this case.

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[1] The names of all parties appear in the caption to the case. References are made herein to Mayo L. Coiner, the former husband of Alayne Barry Adams. Mr. Coiner was tried along with Ms. Adams, and remained a party to the case throughout the first appeal to the Sixth Circuit Court of Appeals, and the hearing on remand. He died while said matter was on appeal to the Sixth Circuit Court of Appeals for the second time. Following filing of Suggestion for Death the case against Mr. Coiner was dismissed.

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## REFERENCE TO OFFICIAL REPORTS OF THE CASE BELOW

This case on its first appeal to the Court of Appeals for the Sixth Circuit resulted in a published opinion, *United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989).

On the second appeal, the order was not recommended for full-text publication. The Court of Appeals for the Sixth Circuit entered its judgment affirming the district court's order concluding that the prosection of Ms. Adams had not been undertaken from vindictive motives and that the district judge correctly did not recuse himself. Further the Sixth Circuit did not find reversible error in the shift of the burden of proof as to the issue of vindictive prosecution. A copy of the Opinion and Order is annexed to this Petition.

## JURISDICTION

On October 25, 1994, the Court of Appeals for the Sixth Circuit entered judgment affirming the district court's order concluding that the prosecution of Ms. Adams had not been undertaken from vindictive motives, that the district judge correctly did not recuse himself, and that the shift of the burden of proof to defendant (Petitioner) did not constitute reversible error. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28 § 1254.

## STATUS INVOLVED

Pertinent part of 28 U.S.C. § 144 provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

## STATEMENT OF THE CASE

This case came before the United States Court of Appeals for the Sixth Circuit two times. On the first occasion, the federal convictions of Ms. Adams for perjury were reversed and dismissed, and the counts regarding filing of false tax returns were remanded to the trial court for "further proceedings on the question whether the prosecution of Ms. Adams and Mr. Coiner for making false tax returns was based on improper motives." *United States v. Adams*, 870 F.2d 1140, 1148 (6th Cir. 1989). The purpose of the remand was to allow Adams discovery on the issue of whether the Government's decision to prosecute was tainted by improper motivation, namely prosecutorial vindictiveness.

Shortly following the remand, the trial judge in the presence of Adams' attorneys made certain remarks concerning Ms. Adams, which Adams asserted showed a distinct bias or prejudice against her. He stated that Adams was guilty and should suffer the rest of her life, regardless of the ruling of the Sixth Circuit. This statement was not an isolated incident, but was consistent with other occasions during the trial of the matter. She thereafter moved for the trial judge to recuse

himself. The court denied the motion. This decision was in error. When the impartiality of a judge might reasonably be questions, **it is the duty of the trial judge to recuse himself**. 28 U.S.C. § 144; *Chitimacha Tribe of La. v. Harry Laws Co., Inc.*, 690 F.2d 1157 (5th Cir. 1982).

After limited[2] discovery, the Court conducted an evidentiary hearing, with witnesses subject to cross-examination, in order to resolve the issue of whether vindictive or selective prosecution had occurred in this matter. After said hearing, the trial court found that there was no vindictive or selective prosecution.

At the evidentiary hearing, the trial court placed the burden of proof on Adams to show vindictive prosecution. Adams relies upon the doctrine of "prosecutorial vindictiveness" outlined in *Blackledge v. Perry,* 417 U.S. 21, 94 S.Ct. 2088, 40 L.Ed.2d 628 (1974). Government witnesses were therefore examined by Adams' attorney on direct, not cross examination. Adams contends that the burden of proof is correctly placed on the government to show that no vindictive prosecution occurred, after the defendant has made a prime facie showing. The Sixth Circuit was held that:

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[2] The Sixth Circuit in its decision referred to the district court allowing "wide-ranging" discovery. Adams had requested further discovery which the court refused to allow, and which prevented Adams from obtaining critical documents which may have contradicted the testimony of government witnesses. Appropriate motions to compel were filed by Adams and the district court did not rule on said motions. The discovery issues were resolved by the court at a discovery conference, without specific ruling.

> "...once a court has found the existence of a realistic likelihood of vindictiveness the burden of disproving it is on the government." *United States v. Andrews*, 633 F.2d, 456 (6th Circuit) (emphasis added).[3]

Without such a showing, there is no need for a hearing. In the instant case the district court ruled that Adams was entitled to an evidentiary hearing, and the district court should have placed the burden on the government. The shift of the burden to Adams was an impermissible and grievous error requiring reversal.

## REASONS FOR GRANTING WRIT OF CERTIORARI

This case meets the considerations governing review on writ of certiorari pursuant to Rule 10, Supreme Court Rules; specifically, the decision of the Sixth Circuit sanctions the actions of the district court, which so far departed from the usual and accepted course of judicial proceedings as to require the supervision of this Court, especially as to the refusal of the trial judge to recuse himself after making clear statements of prejudice against Adams. Adams further contends that the shift of the burden to the defendant after the prime facie showing of vindictive prosecution is impermissible and in conflict with the decisions of this Court.

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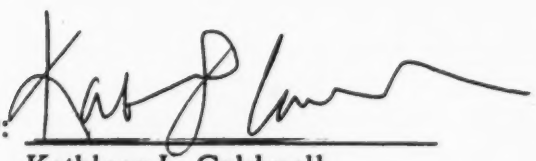
[3] In a parallel line of reasoning, the Supreme Court has held that where a defendant establishing a prima facie case of an equal protection claim violation in jury selection the burden then shifts to the prosecutor to explain with a neutral reason.

## CONCLUSION

For the aforementioned reasons, pursuant to Rule 12, Supreme Court Rules, the Petitioner, Alayne Barry Adams, respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit Petitioner further urges the Court that a Writ of Certiorari is proper inasmuch as the decision below is contrary to the authorities relied upon herein, and require issuance of a Writ of Certiorari. Lastly that the decision below and especially the decision of the trial judge in the district court, affirmed by the decision below, are substantial departures from the accepted and usual course of judicial proceedings, requiring supervision of this Court.

Dated: February 24, 1995.

Respectfully submitted,
TAYLOR, HALLIBURTON,
LEDBETTER & CALDWELL

By: 

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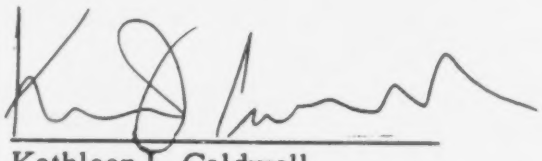
## CERTIFICATE OF SERVICE

Kathleen L. Caldwell, a member of the Bar of this Court, certifies that pursuant to Rule 29, she has served the Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit, and on counsel for the Respondent by enclosing a copy thereof, first-class mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, and to Hon. William L. Barnett, Special Assistant U. S. Attorney, 1900 Fifth Avenue North, Suite 200, Birmingham, Alabama 35203, (205) 731-1785, by depositing same in the mails at Memphis, Tennessee and further certifies that all parties required to be served have been served.

DATED: February 24, 1995.



Kathleen L. Caldwell
Counsel for
Alayne Barry Adams

# APPENDIX

1. Per Curiam Opinion From 6th Circuit Court of Appeals

2. Final Ruling on Remand Proceedings, U. S. District Court

3. Order Setting Evidentiary Hearing, U. S. District Court

4. Ruling on Motion for Disqualification of Judge, U. S. District Court.

5. Motion for Disqualification of Judge due to Bias or Prejudice, U. S. District Court.

6. Affidavit of Alayne B. Adams.

No. 93-5682
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, )

*Plaintiff-Appellee,*

) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE WESTERN DISTRICT OF
) TENNESSEE

ALAYNE BARRY ADAMS,

*Defendant-Appellant.*

BEFORE: **MARTIN, NELSON**, and **DAUGHTREY**, Circuit Judges.

**PER CURIAM.** This appeal presents us for a second time with the defendant's claim that she was the subject of a vindictive prosecution initiated in retaliation for having filed an employment discrimination suit against the government. Finding no error in the district court's thorough opinion rejecting this claim, we shall affirm the challenged order.

The defendant, Alayne Adams, was convicted on charges of penury and filing false tax returns. When the case was here before we reversed the perjury convictions and remanded the remainder of the case to the district court for further proceedings on the vindictive prosecution issue. *See United States v. Adonis*, 870 F.2d 1 140 (6th Cir. 1989).

Ms. Adams, formerly a lawyer for the United States Equal Employment Opportunities Commissions had sued that agency in 1981 for employment discrimination. In the course of discovery the government obtained Ms. Adams' tax returns for 1976, 1977, and 1978. The returns did not reflect income Ms. Adams had earned in 1977 and 1978 from the private practice of law. Although the tax deficiencies were not large, and although Ms. Adams and her late husband (and co-defendant) Mayo Coiner paid the deficiencies, Ms. Adams was indicted and convicted.

The district court had initially denied a motion to dismiss the case without having held an evidentiary hearing on the vindictive prosecution issue. We thought that there were sufficient indications of impropriety to suggest a need for limited discovery and possibly a hearing as well, depending on what turned up in discovery.

On remand the district court allowed wide-ranging discovery. After the completion of discovery, the court conducted a three-day evidentiary hearing at which numerous witnesses testified. The court subsequently issued a 28-page opinion carefully reviewing the evidence and concluding that the prosecution of Ms. Adams had not been undertaken from vindictive motives.

II

A

Ms. Adams contends that the district court improperly allocated the burden of proof on her vindictive prosecution claim. A defendant seeking relief from prosecution bears the burden of proving prosecutorial vindictiveness,

"and must establish either (1) actual vindictive-

> ness, or (2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness. Thereafter, the burden shifts to the prosecution to justify its decision [to prosecute] with legitimate, articulable, objective reasons." *United States v. P.H.E., Inc.*, 965 F.2d 848, 860 (lOth Cir. 1992).

Ms. Adams asserts that she made a showing of a "realistic likelihood of vindictiveness" in this case; that the court erred when it found to the contrary; and that the government did not come forward with sufficient evidence to show that the prosecution was not vindictive.

Regardless of whether Ms. Adams made the prima facie showing necessary to put the government to the burden of explaining its actions,[1] we think that the government offered ample evidence that the prosecution was legitimate. In this connection we note that following the remand, Ms. Adams abandoned her claim that the head EEOC attorney in Memphis had procured her prosecution out of vindictive motives. Ms. Adams instead focused her attack on Devon Gosnell, the assistant United States attorney who handled both the EEOC suit and the criminal prosecution. Ms. Gosnell, who had never been an employee of the EEOC, testified that she felt duty-bound to investigate Ms. Adams when discrepancies were uncovered between Ms. Adams' deposition testimony

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[1] A "realistic likelihood of vindictiveness," which requires a court to presume that the prosecution was in fact vindictive, will be present only in a narrow range of cases. See *United States v. Goodwin*, 457 U.S. 368, 381-84 (1982) (emphasizing hazards of broad application of presumption of vindictiveness). Our sister circuits have repeatedly declined to find a realistic likelihood of vindictiveness in cases where an individual sued the government and then was indicted on criminal charges. *United Sates v. White* 972 F.2d 16, 19 (2d Cir.), cert. denied, 113 S. Ct. 669 (1992); *United States v. Miller* 948 F.2d 631, 634 (lOth Cir. 1991), cert. denied 112 S. Ct. 1278 (1992).

in the civil case and the tax returns that Ms. Adams and Mr. Coiner had filed in the late 1970s. Ms. Gosnell further testified that she lacked the power to institute the prosecution The final decisions to convene an investigative grand jury and to seek an indictment were made instead by officials of the Justice Department and the Internal Revenue Service in Nashville and Washington, D.C.

Ms. Gosnell's testimony was corroborated by other evidence, which indicated that the ultimate decision-makers neither knew the details of Ms. Adams" lawsuit against the EEOC nor had any ulterior motive for wishing to punish her. Correspondence between officials in the IRS and the Department of Justice cited objective and neutral law enforcement goals to be served by instituting a prosecution. These officials believed that prosecution would tend to deter others from violating the tax laws, and they apparently saw the violations as being particularly blameworthy in light of the defendants' status as attorneys.

The evidence presented by Ms. Adams was not particularly helpful to her. She did produce evidence tending to show that an investigative agent had told her lawyer that it was his job to find evidence that Ms. Adams had committed a crime, "no matter how small," but the lawyer's account of this incident was rather vague and tentative, and the comment proved nothing about the intent of the decision-makers.

Similarly, the affidavit of Andrew Gipson (a former IRS investigator and an accountant for the defendants) was inapposite to the issue of vindictiveness, because it offered no insight on the prosecutor's state of mind. The affidavit of Charles Dixon (a former EEOC employee) addressed only the motives of the EEOC lawyer, not the prosecutor. In light of impeachment evidence submitted at the hearing, the district court did not consider the Dixon affidavit credible.

In short, Ms. Adams offered little reason to disbelieve the government's account of the events leading to her indictment and prosecution. We think the district court was entitled to credit the government's story and to find that the procedures used by the government ensured that the charging decision was untainted by a desire for retaliation.[2]

B

After the remand, Ms. Adams filed a motion to disqualify the district court judge. She asserted that certain comments made by the judge during a conference with counsel showed him to be biased against her. The court denied the motion, and Ms. Adams says it erred in doing so.

28 U.S.C. §144[3] allows a party to a district court proceeding to seek the disqualification of the presiding judge where the judge harbors a bias or prejudice for or against one of the litigants. A judge is presumed to be impartial, and a litigant seeking disqualification bears the burden of alleging facts that would lead a reasonable person to question the neutrality of the judge. Bolt v. KMI Continental, IMC., 821 F. SUPP. 846, 847 (D. Conn. 1993). Where the movant fails

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[2] Ms. Adams claims here, for the first time, that she is the victim of improper selective prosecution. Because she did not raise this claim before the district court, we decline to address it. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 243-44 (6th Cir. 1991).

[3] Section 144 states, in relevant part:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

to establish grounds for recusal, the district judge is obliged to deny the motion and hear the case. *SEC v. Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989). The judge's decision on a motion to disqualify is reviewed for abuse of discretion. *Molina v. Rison*, 886 F.2d 1124, 1131 (9th Cir. 1989).

To be disqualifying under §144, the alleged bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinned Corp.*, 384 U.S. 563, 583 (1966). See also *Liteky v. United States*, 114 S. Ct. 1147, 1151-52 (1994).

In this case the defendants did not assert that the judge harbored a bias against them "stem[ming] from an extra judicial source." The defendants asserted only that he had made pejorative statements during an in-chambers conference, when he commented that a jury already had decided that they were liars.

The judge's comment was true as far as it went; after a full trial on the merits, a jury had indeed convicted Ms. Adams of perjury and of making a false statement on a tax return under penalty of perjury, and it had found Mr. Coiner guilty of the latter offense. The judge's remark was thus based on what he had learned during the trial and was not a ground for his disqualification. Further, there is no reason to believe that his opinion on the defendants' veracity would "result in [his having] an opinion on the merits" of the remaining proceedings. *Grinnell*, 384 U.S. at 583. The only matter then pending before the district court was the defendants' motion to dismiss because of vindictive prosecution. The defendants' propensity for truth-telling had no bearing on the merits of the moron; the merits turned, rather, on the motivations and thoughts of the various government actors.

**AFFIRMED**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA

vs. No. 86-20083-4B

ALAYNE BARRY ADAMS and
MAYO L. COINER,

Defendants.

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FINAL RULING ON REMAND PROCEEDINGS

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The attorney for the defendants Adams and Coiner on July 3, 1986, filed in this criminal case a Motion to Dismiss Indictment Due to Retaliatory Prosecution (Motion to Dismiss), which sought pretrial discovery to permit the defendants to investigate the conduct of attorneys for the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ) acting through the Office of the United States Attorney for the Western District of Tennessee. The discovery was sought in furtherance of the claim that EEOC and DOJ officials had caused the defendants to be indicted because Adams as an attorney for EEOC had filed a gender discrimination case against the EEOC and some officials in the Memphis office. The judge of the trial court denied the request for discovery and denied the Motion to Dismiss. Subsequently, the case was tried and the jury found the defendants Adams and Coiner guilty of subscribing to false income tax returns as husband and wife for the years 1977 and 1978 in violation of 26 U.S.C. §7206(1). The Court of Appeals on April 3, 1989, filed its opinion which is reported as *U.S. v Adams, Coiner*, 870 F.2d 1140 (6th Cir. 1989). In

doing so, the Court of Appeals noted that "this is one of those rare cases where the defendants are entitled to discovery on the issue of whether the government's decision to prosecute was tainted by improper motivation." 870 F.2d at 1141.

On August 8, 1989, there was entered on the docket sheet a Scheduling Order which set forth the scope, limits and time of discovery in order to comply with Court of Appeals remand decision. The trial court did not apply totally the discovery procedures in the Federal Rules of Civil Procedure; however, the discovery that was allowed, included interrogatories, motions to produce and oral discovery depositions under the approval of the Court as to scope. The Scheduling Order directed that the discovery should be expedited.

Regrettably, the discovery had hardly been commenced when delays were encountered. The first delay was occasioned by a motion by defense counsel to require this judge to disqualify himself. This was briefed, presented and denied. The next delay was occasioned by the motion of the defendants to disqualify the United States Attorney for the Western District of Tennessee and his assistants as the attorneys for the United States in further proceedings in view of their involvement in the issues in this case and in an EEOC discrimination case filed by Adams. This motion was granted, which necessitated having the DOJ appoint an attorney to handle the matter. Bill Barnett, Esquire, an Assistant United States Attorney for the Northern District of Alabama was appointed and has continued to handle the case during the entire remand proceedings. However, this has caused delay in view of his lack of short notice availability in this district for preliminary matters. Another cause of delay was the serious illness and surgery of the defendant Adams. Similarly, discovery was commenced but delayed due to the heavy trial schedule of the lead attorney for the defendants, Kathleen L. Caldwell, including her participation in another income tax

case. Orders were entered officially extending the completion date for discovery. After discovery was complete, the Court conducted a non-evidentiary hearing in order to let the attorneys for the defendants and the United States argue and advocate their respective positions as to whether or not an evidentiary hearing should be held. On October 7, 1992, this Court entered its Order Setting Evidentiary Hearing in which the Court observed on page 2:

> Because some of the evidentiary material referred to in the Court of Appeals opinion was relied upon in order to explain the entitlement to discovery as opposed to admissible evidence on the issue of improper prosecutorial motives, the Court has determined that an evidentiary hearing with witnesses subject to cross-examination is necessary to resolve the issues presented to this Court.

The ultimate determination to be made at the end of the evidentiary hearing was whether the portions of the indictment charging the defendants with making false income tax returns should be dismissed because the indictments had been obtained by "vindictive prosecution."

On November 30, 1992, the evidentiary hearing was commenced and was completed on December 2, 1992, after the presentation of 16 witnesses in person or by deposition. Counsel requested time to receive the transcript of the hearing in order to prepare the proposed findings of fact and conclusions of law. Whereupon the Court ordered opposing counsel to submit proposed Findings of Fact and Conclusions of Law (FFCL) simultaneously on January 29, 1993. The transcript of the hearing consists of 732 pages in four volumes. It was not completed until January 19, 1993. The Court granted an extension of time for filing the proposed findings of fact and conclusions of law to March 9, 1993, for

the reasons set forth in Order on Motion for Extension of Time to File Findings of Fact entered on the docket on February 3, 1993

Introduction

In early 1979, the defendant Adams made application for a position of Trial Attorney in the office of the EEOC at Memphis, Tennessee. At that time, an applicant was called upon to indicate the amount of income that the applicant had received in the three years prior to employment. The Head Attorney called upon Adams to furnish the prior income, and she did so by letter dated March 17, 1979.[1] Adams was hired in mid-1979. In July of 1981, she filed suit against the EEOC for gender discrimination in her employment. The Head Attorney was named as a defendant along with the EEOC. In the course of the civil lawsuit, Adams was deposed and was asked about the source of the amount of the income that she had received. In oral depositions and in a hearing before the magistrate, she established the source of the information as "Schedule C" of the respective income tax returns. The testimony and oral deposition before the magistrate later became the basis of an indictment against Adams for perjury and against Adams and Coiner for violation of 26 U.S.C. §7206(1) by willfully making false statements on their income tax returns for 1977 and 1978. The indictments were returned on February 27, 1986, after the civil case had been tried.

Prior to the trial of the criminal case, the Motion to Dismiss was filed and denied. The Motion to Dismiss was

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[1] The term Head Attorney is used in this ruling in furtherance of the reference that the Court of Appeals made in its opinion to the Regional Attorney in the Memphis office.

based upon the theory of "vindictive prosecution" whereby the EEOC procured the investigation by the IRS and the United States Attorney's Office for the Western District of Tennessee as retaliation for Adams having filed the civil suit against the EEOC. Allegedly, the primary procurer of the vindictive prosecution by the EEOC was the Head Attorney. The theory of the EEOC being the procurer of the alleged vindictive prosecution was undoubtedly urged in the appeal of this case before the Court of Appeals. See discussion by the Court of Appeals on p. 1144 of 870 F.2d wherein the affidavit of Charles A. Dixon, District Director of the EEOC's Memphis Office, contained particularly strong accusations against the Head Attorney. Similarly, the Court notes that the Court of Appeals on p. 1146 of 840 F.2d directed this Court as follows:

> Discovery should be confined to the narrow issue of whether the EEOC, acting on an improper motive, induced the Department of Justice to institute a prosecution that would not otherwise have been undertaken.

After all of the discovery had been taken, including the oral deposition of the Head Attorney and Devon Gosnell, the Assistant United States Attorney who had been assigned to assist EEOC attorneys in the civil lawsuit, the lead attorney for the defendants, Ms. Caldwell was asked by the Court who was the alleged vindictive prosecutor. She replied it was not the Head Attorney of the EEOC, but it was Devon Gosnell, who caused the grand jury investigation and resulting indictment to be procured. 2T-219.

Definition of Vindictive Prosecution

Prior to the evidentiary hearing, the Court called upon the

respective attorneys for the parties to state the authorities relied upon. Based upon those and the Court's own investigation, the Court concludes that the basic principles controlling a charge of vindictive prosecution are as hereinafter stated.

Due process prohibits vindictive prosecution, but a defendant is not required to show that the prosecution was "actually vindictive." However, a defendant must show a "realistic likelihood of vindictiveness" by the prosecutor. *Thicken v. Roberts,* 468 U.S. 27 (1984); *Blackledqe v. Perry,* 417 U.S. 21 (1974). In *United States v. Andrews,* 633 F.2d 449, 455 (6th Cir. 1980), the opinion of an en bans court stated:

> The mere possibility that prosecutorial or judicial conduct may be vindictive is insufficient to trigger judicial sanctions. It is only where the possibility of vindictiveness is substantial that *Pearce-Blackledge* sanctions are triggered. The simple fear on the part of a defendant that a prosecutor may be retaliating against him is insufficient, by itself. Put another way, the mere appearance of vindictiveness is not enough to trigger *Pearce-Blackledge* sanctions. The factual situation must pose a realistic likelihood of vindictiveness.

The Court's opinion in *Andrews* also noted that there are two factors which must be considered in the determination of the issue of "realistic likelihood of vindictiveness." First, the prosecutor's stake in deterring the exercise of some right. Second, was the conduct of the prosecutor vindictive in its nature? The standard of realistic likelihood of vindictiveness is an objective one — a reasonable person, not a defendant's subjective impressions. 633 F.2d at 454.

Reasonable Vindictiveness of Gosnell

At the time of Gosnell's participation in the civil case of

Adams against EEOC, she had been an Assistant U. S. Attorney in this Court approximately ten years. While she did not handle all of the income tax cases, she handled more than the other Assistant U. S. Attorneys.

Because the suit of Adams as an attorney against the EEOC and particularly the Head Attorney involved other EEOC attorneys in the office, it was inappropriate for the case to be defended by other attorneys in the Memphis office. Therefore, EEOC attorneys from other areas were assigned to handle the case. In accordance with a common practice, an Assistant from the United States Attorney's Office in this locality was also assigned to assist in the handling of the civil case against a U. S. government agency. The Assistant who was first assigned from the United States Attorney's Office for the Western District of Tennessee was Katherine Carlyle; however, during the early stases of the case, she announced her decision to go into private practice. Therefore, Gosnell was substituted as her replacement. Gosnell did not participate in all of the pretrial proceedings. She identified her role as "somewhat like local counsel."

Gosnell did not participate in an initial deposition of Adams in the civil case on December 2, 1982, when Adams was asked about the figures in her letter of March 17, 1979, wherein she replied she had taken them off Schedule C for her income tax returns. Gosnell was present in July 1983, at a hearing before the magistrate on a Motion to Dismiss the case for failure to comply with the government's discovery requests where the sources of reported income was asked.

In the civil case, the defendants sought through discovery to have Adams produce the income tax returns of Adams and her spouse, Coiner, for the years 1977, 78 and 79. In that civil litigation, Adams was represented by Alan Chambers, an experienced plaintiff's attorney in employment discrimination cases. He was handling the case for Adams on a contingent

basis; however, he became the attorney based upon his having been associated with Adams in the private practice of law before her employment with EEOC. The income tax returns were not produced, and an on-going series of negotiations and requests ensued between Chambers and Gosnell. Chambers gave Gosnell various reasons why he could not produce the returns such as the defendants could not find them or they didn't have them. In this process, Gosnell became suspicious that they were deliberately being withheld because there was something to hide and Chambers became suspicious that Gosnell's persistence indicated something detrimental to Adams in the civic case. The judge of this district who was handling the civil case ordered Adams to produce the returns. This did not prompt immediate action; however, ultimately Chambers told Adams and Coiner to obtain the returns primarily to see if anything was wrong. The returns were obtained, and in January 1984, Adams and Coiner sought help from a CPA in Memphis who discovered that not only were there no Schedule C's for the income of Adams, but also her income was not included on the return. This prompted the preparation of amended returns by the CPA and the filing of them resulting in additional taxable income and taxes for the years 1977 and 78.

On April 16, 1984, after the amended returns had been filed and all returns had been furnished to Gosnell, the deposition of Adams was taken again, and Gosnell participated therein.

Gosnell was called as a witness in the evidentiary hearing by the defendants. During the course of her testimony, she was asked what motivated her to request an investigation and permission to indict on the tax charges and perjury charges. Her testimony on pages 376 and 377 is as follows:

Q. As a result of having attended the second deposition of Ms. Adams, did you formulate an opinion with regard to whether or not she had testified falsely under oath?

A. I believed that she had at that point, yes.

Q. And did you develop a judgment with regard to whether YOU had observed tax violations?

A. Yes, particularly at that point I saw her amended returns, I had original copies of the original returns and her prior statements with respect to income, and there were clearly some major discrepancies which I felt made the original returns false.

Q. Based upon your oath of office, what duty, if any, did you feel compelled to follow?

A. I felt obligated to turn it over to the investigating agencies.

Q. And was that obligation for any other reasons other than your oath of office?

A. Well, certainly as a private citizen any violations that I would see, I would also feel obligated to turn over to the authorities, but as an Assistant United States Attorney I'm charged with enforcing the laws of the United States, so I have even a greater obligation in that position to turn over violations of the law to law enforcement authorities.

Q. Did the Equal Opportunity Commission in any way impose upon you an impetus to go forward with any type of prosecution, — Ms. Adams or Mr. Coiner?

A. No, they — they made no effort to influence me in any way.

## The Investigation

On January 21, 1985, Gosnell caused a letter to issue to the office of Chief of Criminal Investigation Division of IRS (CID) advising them-of possible criminal tax violations and requesting that an investigative grand jury be authorized. 2T-250, 365; 3T-676 Ex. 5. The process for approval of a grand jury investigation requires several levels of consideration, the first is the office of Regional Counsel for IRS, where a decision is made based upon their analysis of the data supplied. 2T-335-337 Ex. 12. Regional Counsel sent their favorable recommendation to the Criminal Tax Division of the DOJ for the final review before the grand jury investigation can begin. 2T- 331.

DOJ authorized the grand jury investigation. 2T-331-334 Ex. 11. When the grand jury has concluded its investigation, before a true bill can be sought, the CID special agent must prepare a special agent's report (hereinafter SAR). 4T-685. Special Agent Charles E. Daniel (SA Daniel) prepared the report, had it approved by his Group Manager and Chief and forwarded it to IRS District and Regional Counsel for their review and recommendation that then accompanies the SAR to DOJ. 2T-366 & 367; 4T-686-689 Ex. 13. Though it was a grand jury matter, it was required to be referred back to DOJ for approval or disapproval for prosecution. 2T-368-370; 4T-689.

During the DOJ review process, if approved for prosecution, DOJ specifies the charges, the verbiage for the indictment, the years to be charged and even the parameters for plea bargaining. 2T-351; 4T-690 & 691 Ex. 14. On December 31, 1985, Ms. Gosnell received the authority from DOJ to proceed with the prosecution. Ex. 14. The authorization reflected the reviewers that had analyzed the investigation and was accompanied by a memorandum for prosecution.

2T-372-374 Ex. 14. The response from DOJ was the usual procedure followed for all tax reviews. 2T-372.

## Defendants' Contentions Based upon Proposed Findings of Fact and Conclusions of Law

As heretofore indicated, the Court determined at the end of the evidentiary hearing that the Court would require proposed findings of fact and conclusions of law from the parties through their counsel. An extension of time for filing the proposed findings was requested by the defendants and granted by the Court. On March 9, 1993, there was filed in the cause the Proposed Findings of Fact and Conclusions of Law on Behalf of Defendants (FFCL of defendants). The conclusions are set forth on pages 7 and 8 of the FFCL as follows:

> WHEREFORE, defendants submit that this Court should hold:
>
> 1. That the prosecutions in this action were contrary to the IRS guidelines as published in section 100 of the Internal Revenue Service Law Enforcement Manual IX.
>
> 2. That these prosecutions violated IRS guidelines because defendants had made a voluntary disclosure of their tax deficiencies prior to the IRS investigation and prior to Defendants knowing of that investigation.
>
> 3. That the prosecutions violated IRS guidelines by using different years and averages for the investigation and the prosecution.

4. That the prosecutions should be dismissed as defendants have shown that other taxpayers were not prosecuted under similar circumstances.

The FFCL of defendants does not assert any incident of retaliatory conduct on the part of Gosnell. In fact, the only time that Gosnell's name is referred to in the proposed findings is on page 2 thereof wherein an expert witness, Paul J. DesFosses undertook to testify that Gosnell misstated facts in order to discredit the defendants when she included in her request for a criminal investigation the fact that the records of the IRS did not show income tax returns had been filed by the defendants in 1981, 82 and 83. This information was obtained in an early search of the IRS records when the 81-83 returns were sought under the wrong name. This Court determined that this was irrelevant to the issues concerning 1977 and 78. During the progress of the investigation by the various officials of IRS and DOJ, the mistake was discovered, the basis for including those years in the request for investigation was eliminated from consideration, and possible indictment was never considered. The suggestion by the expert of the defendants that this tainted the investigation and caused the indictment for different charges in different years is not convincing.

The remainder of the proposed FFCL of defendants is confined to action or failure to act on the part of SA Daniel and other officials of DOJ and IRS over whom Gosnell had no control.

Conclusions 1 and 3 of FFCL of Defendants

During the discovery period prior to the hearing, defendants requested that they be given the proper law enforcement manual that was applicable to the prosecution which

resulted from the investigation requested by Gosnell. The United States objected to furnishing the manual on the grounds that it was for employees and officials of IRS and DOJ and was confidential. The Court overruled the objection of the United States to furnishing any part of the manual and directed an appropriate official of the IRS to present the portions applicable to the prosecutions in this case *on camera*. Although the Court honored the request of the United States in disclosing the pertinent provisions of the manual, the Court became persuaded that any claim of confidentiality and privilege was compromised because one of the experts offered by the defendants to express an opinion on the appropriate guidelines obtained a copy of the guideline as it had been published in the National Law Journal and was readily available for reference in the law library of Memphis State University in Memphis, Tennessee. The Court found and holds that Law Enforcement Manual IX Section 131.1 (12-9-82), sets forth the pertinent provisions as follows:

(1) ... the following criteria apply to income tax investigations:

(c) Criminal prosecution will be recommended under IRC 7206(1) only if the evidence indicates that the average yearly additional tax for criminal purposes would be $2,500 or more....

(2) Investigative preference will be given to cases that span three prosecution years rather than cases involving violations provable as only one or two years. This preference is particularly relevant where an indirect method of proof is utilized to establish the tax offense

The record reflects that no tax was due for 1979 on the basis of the original or amended return. The original return for 1978 for the defendants was false by more than $2,500

due to the failure to report any income of Adams. The original return for 1977 of the defendants was false for less than $2,500 for the year 1977 due to the absence of the income of Adams. When the two years were averaged, the additional tax omitted from the original returns was in excess of $2,500. The defendants assert that these guidelines required the averaging of 1979 return in which no tax was due because all three of the returns were filed in April of 1980. At the criminal trial, it was shown that Coiner had assumed the responsibility of preparing the tax returns for himself and Adams. He did not file returns when due for reasons advocated by him; however, he did not request an extension for filing the returns.

The defendants offered Harry William Laughlin, III, a tax attorney in Memphis, Tennessee, who was an attorney with the Chief Counsel's Office of the IRS in Washington, D.C. for five years, as an expert to corroborate the contention that the years 1977, 78 and 79 should have been averaged instead of just the two years 77 and 78. He was qualified as a tax attorney; however, there was no proof that he had ever applied or interpreted the guideline involved in this case. He did corroborate the government's position that LEM IX Section 131.1 set forth the proper guidelines. He testified that it was significant that all three of the tax returns for 77 through 79 were filed at the same time. On cross-examination, it was brought out that the guideline used the word "preference" to be given cases that span three years rather than one or two years. He acknowledged that the use of the word preference meant that cases involving three years would be investigated ahead of those involving two years.

The contention and proof of the government reflects that SA Daniel had been trained and had applied the guidelines as advisory and not compulsory. The authorization and investigation of the guidelines and the subsequent prosecutions do

not contradict the wording of the guidelines, and the Court notes that the series of reviews of the reports takes into account numerous other factors that are significant to the policies of when an investigation will be authorized and when an attempt to obtain an indictment will be approved and authorized. This Court concludes that the defendants have not shown any realistic likelihood of vindictiveness by violation of or failure to comply with the appropriate sections of the guideline manual applicable to this investigation.

Conclusion 2 of FFCL of Defendants
"Voluntary Disclosure"

This is claimed to be another IRS guideline violation. This is based upon the testimony of Paul J. DesFosses. The proposed FFCL of defendants quotes from 4T-629-632. The witness undertakes to state that there are four criteria to be considered in criminal investigations. One of these is voluntary disclosure of the violation by the proposed defendant. He testified that this is a reference to P-9-2 which is a reference to a manual that is not the one applicable to the prosecutions in the instant case. The witness testified that it was a voluntary disclosure because the taxpayers disclosed their violation of making a false statement in their original return by filing an amended return and paying increased tax for the false statement. The premise is based upon the fact that the IRS did not know that the first statement was false until the taxpayers told them. The witness could not find or furnish a definition of voluntariness in the guidelines. He used his own definition based upon his experience. The Court is of the opinion that the facts of this case do not show a totally voluntary disclosure of a violation. In the first place, they did not volunteer that the first return was willfully false which is necessary to establish a violation. Furthermore, the amended return was prompted by the attorney in the civil case insisting

that the taxpayers obtain the original returns from IRS to find out what, if anything, was wrong with it based upon his suspicion caused by Gosnell's persistent efforts to have them furnish the original returns.

Additionally, the validity of the witness' opinion testimony as an expert is seriously damaged by his total confusion on Hearing Exhibit 31. Inquiry was made of him about LEM IV. He erroneously distinguished it from LEM IX, the one applicable to this case, as IV being for agents and IX being for lawyers. Furthermore, when he was shown Exhibit 31, he failed to notice that a portion he was reading was not applicable to the facts of this case, and he interpreted the portion that he thought was applicable erroneously.

No authority for voluntary disclosure being a bar to prosecution has been shown, and as noted above, this is alleged to be a guideline application which does not have the same validity and strength as a statute or a clear interpretation of a court. Therefore the Court concludes that proposed conclusion 2 of FFCL of Defendants does not establish a realistic likelihood of vindictiveness.

Conclusion 4 of FFCL of Defendants
"Other Taxpayers Under Similar Circumstances
Were Not Prosecuted"

This is based upon a portion of the Court of Appeals opinion in this case set forth on page 1144 of 870 F.2d as follows:

> The government filed a brief opposing the motion to dismiss, and the defendants filed a reply brief. In their reply brief the defendants asserted that during the give years preceding the indictment of Ms. Adams

there had been only ten indictments for perjury in the Western District of Tennessee, none of which indictments had arisen out of testimony in a civil case. The ten indictments were listed in an appendix to the brief. The brief also asserted that in the preceding five years no one had been indicted in the Western District for tax evasion where taxes were not still due at the time of the indictment. A purported list of the tax evasion indictments was attached to the brief.

The sentence which refers to the assertion in the reply brief to the Motion to Dismiss concerning no indictments for perjury had arisen out of civil cases, was applicable only to Ms. Adams. The perjury counts against Ms. Adams were dismissed by the Court of Appeals for not being material to the issues in the civil case in the opinion of the Court of Appeals. Therefore this Court concludes that it is not relevant to the income tax charges against both defendants in Counts 1 and 2.

The second part of the above-quoted portion has reference to Appendix B. On page 3 of the brief, there is a statement that there had been 59 indictments for income tax evasion filed in the Western District of Tennessee in the five years immediately preceding the indictments in this action. In the next paragraph of the brief starting on the bottom of page 3, there is the argument that only 11 of the 59 indictments were for failure to pay taxes of $10,000 or less, and in each of those 11 indictments the defendant was charged with active fraud. Section 7206 of the Internal Revenue Code is to be distinguished from 7201, which is the "tax evasion" section. A false statement under the penalty of perjury for prosecution does not require the prosecution to prove existence of any taxable income at all. *United States v. Carter*, 721 F.2d 1514, 1539 (11th Cir. 1984). Therefore the tax evasion cases cited in the brief are not relevant. Furthermore the 10 cases

that are listed in Appendix B to the brief involve active fraud such as the use of multiple social security numbers, non-existent dependents and the government was seeking to collect unpaid taxes or illegally obtained refunds. The crimes charged in this case were complete at the time the false return was made under the penalty of perjury in a willful manner.

The proposed FFCL of defendants indicates that the records in Appendix B to the brief and the allegations and lists have not been challenged. The compilation of the 59 cases is not made known, and it is apparent that the list of 10 cases does not address the same crimes that are in issue in this case. Furthermore, these records are not readily available due to their age and their having been forwarded to the archives for storage. It is not the responsibility of the government to challenge records or statements that do not support the contentions of the defendants to establish realistic likelihood of vindictiveness.

Concerns Expressed by Court of Appeals
on 870 F.2d 1144

First, the Court of Appeals notes that when SA Daniel interviewed Alan Chambers, lawyer for Adams in the civil case, Daniel allegedly told Chambers that it was his (Daniel's) job to find Adams guilty of something "no matter how small." The opinion on page 1144 indicates that Daniel allegedly told Andy Gipson, a CPA assisting the defendants, essentially the same thing. The opinion notes that these representations were in the brief and were not supported by affidavits. At the hearing, Alan Chambers was called as a witness by the defendants. During his testimony, he was tendered two forms of affidavits which were introduced as Exhibits 4 and 28 to the evidentiary hearing. He was recalled by the United States. When he first testified, he identified Exhibit 4 as an affidavit which he said was substantially similar

to one he had signed and sworn to before SA Daniel in August of 1985. On recall, he was tendered Trial Exhibit 28 which is a copy of an affidavit which was tendered as Trial Exhibit 4. Exhibit 28 has the initials of Chambers on the second page to indicate where he made changes by striking portions of the affidavit and adding substitutions. Exhibit 28 is signed "Chambers 8-9-85," and is subscribed and sworn to before Charles E. Daniel, Special Agent, Internal Revenue Service. At the end of the affidavit, the affiant stated he had read the foregoing statement consisting of two pages and that the statements contained therein are "true, accurate and complete to the best of my knowledge and belief." Neither Exhibit 4 nor Exhibit 28 has any reference to the statement that Daniel told Chambers that his job was to find Ms. Adams guilty of something no matter how small.

The testimony on Chambers' first appearance in the evidentiary hearing was very comprehensive in the matter of his representation of Adams in the civil case. That included testimony concerning his interviews with SA Daniel. Chambers had met Daniel previously and testified that Daniel came to see him about this case on more than one occasion; however, he did refer to a specific interview when he as the lawyer for Ms. Adams was trying to obtain any information that he could in her behalf including what he could find out about the criminal investigation being conducted by Daniel. At the same time, Daniel was interviewing Chambers for the purpose of obtaining whatever information he could obtain from Chambers that would address his assignment as the investigating officer of Coiner and Adams. On page 2T-175 in response to questions by Ms. Caldwell, the following is stated:

> (Q Did Mr. Daniel ever describe to you (Chambers) what his purpose was in investing [sic] Ms. Adams?

(A) Yes, he did. We had several discussions about — I was Ms. Adams' lawyer, I felt that the — well, and, of course, I wanted to — and my goal was to be persuasive on her behalf. And I was representing her interest, and there was no doubt about that, and he told me what his function was, and he told me that his function was to find her guilty of something no matter how small.

And then we even discussed that further, that I told him that he would have to find a factual predicate, and he said that is what he was looking for.

On cross-examination by Mr. Barnett for the United States, the following questions and answers are stated on page 178 of volume 2 of the transcript.

(Q) And are you as certain about that as you are about the fact that Eddie Daniel told you he was out to get her regardless of how small the tax consequences were?

(A) Well, again you are using the word certain. I'm not 100% certain of anything. I'm comfortable that is my best recollection and that is what I honestly believe happened. Eddie Daniel never said I'm about to get her. He said his job was to convict her or get her convicted of something, no matter how small.

(Q) Now what is your testimony right now that his statement was to you on that occasion right now?

(A) His job was to get her found guilty or convicted of something, and then no matter how small is the best I can characterize it.

SA Daniel testified as the last witness in the case, and he definitely denied that he had stated that his job was to get her convicted of something no matter how small. Gosnell also denies that she assigned him that job. In the total circumstances, particularly the circumstances whereby Chambers and Daniel were both trying to obtain information and making remarks that probably were not literally accurate, the Court cannot find that a realistic likelihood of vindictiveness is shown based upon the criminal investigator's alleged remarks in the course of his investigation. Furthermore it must be noted that he had limited power to induce an improper indictment.

Affidavit and Deposition of Andy Gipson

As noted above, the opinion of the Court of Appeals on page 1144 of 870 F.2d notes that the brief in support of the defendants' motion to dismiss contains a statement that Daniel told Andy Gipson "essentially the same thing" as he is said to have told Alan Chambers, namely that Daniel's job was to find Ms. Adams guilty of something no matter how small. This statement allegedly made by Daniel was also noted not to be supported by an affidavit.

On page 1144 of the remand opinion, the Court of Appeals did discuss an affidavit of Mr. Gipson that was in the record. Three portions of the affidavit were referred to in the Court of Appeals opinion, namely (1) "the omission of Alayne Adams' income from the joint returns ... for the years 1977 and 1978 would not ordinarily constitute a criminal issue due to the insignificant amount of her earnings..."; (2) that in Gipson's opinion "had Alayne Adams not brought suit against the EEOC, no criminal income tax investigation would have taken place with regard to her or Mayo Coiner and no indictment would have been approved..."; and (3) if the omission of Adams' earnings had been discovered by a

Revenue Agent or in the course of a tax audit, in Mr. Gipson's opinion, "the matter would have been handled by the Civil Division of IRS, with no criminal proceedings...."

At the evidentiary hearing, Ms. Caldwell as attorney for the defendants announced to the Court that repeated attempts to serve a subpoena on Mr. Gipson who resides and offers his services as a CPA in Memphis, Tennessee, could not be served, and therefore he could not be offered as a witness at the hearing. His deposition had been taken for discovery purposes prior to the hearing by Mr. Barnett as attorney for the United States. Thirty-one pages of the approximate thirty-five pages of the deposition were read into the record. 3T-539. Regrettably most of the deposition is of little help due to the argumentative and sometimes uncooperative exchanges between Mr. Barnett as the attorney and Mr. Gipson as the deponent. The deposition does establish that Gipson was an auditor with the IRS from 1972 until 1976 and a special agent with the CID from 1977 until 1982. 3T-512. The deposition also verifies that Gipson was brought into the case to assist with the defense of the criminal investigation sometime in early 1985 when Jim McMahon was the defense attorney for the defendants. After McMahon no longer represented the defendants, Gipson continued to assist Kemper Durand who had been retained to handle the case after the indictment was returned. Durand was the attorney who filed the Motion to Dismiss. The following questions and answers about Gipson's pretrial affidavit appear at 3T-514:

(Q) How did it come about that this affidavit was drafted? Did you actually dictate this affidavit?

(A) I believe I spoke in generalities about the affidavit to Kemper Durand. The actual wording on there was dictated by Mr. Durand. I would imagine that it was, in fact, typed in his office.

(Q) How did it come about that this affidavit was created?

(A) Mr. Durand posed those questions and I responded. I don't suppose that I knew really what he intended to do with it at the time.

Later in the deposition, Mr. Gipson testified that he was billing the defendants on an hourly basis; however, he was reasonably certain that he made no billing for the affidavit because it didn't take but a few minutes. 3T-516.

Although Mr. Gipson did not retract his statement in the affidavit that the income from the joint returns filed by the defendants for the years 1978 would not "ordinarily constitute a criminal issue" due to the small earnings and resulting underpayment of tax, he did testify that the words "would not ordinarily constitute a criminal issue" used in the affidavit were not his words. 3T-532. Additionally, in response to a specific question, he acknowledged that the amounts of income omitted and other circumstances fit within the guidelines for a prosecutable case under 26 U.S.C. §7206(1). 3T-531.

The overall proof in the case establishes that Mr. Gipson was accurate in his statement in the affidavit that had Adams not brought suit against the EEOC no criminal investigation would have taken place and no indictment would have been approved; however, that does not establish vindictiveness, As heretofore indicated, Ms. Gosnell as an experienced prosecutor of income tax cases would never have learned of the strong possibility of there being a violation of 26 U.S.C. §7206(1) by Adams and Coiner. As heretofore pointed out, she was motivated by her duty as an Assistant U. S. Attorney and as a citizen to seek to have an investigation made for possible prosecution.

Similarly, the portion of the affidavit which is based upon a hypothetical proposition that if the omission of Adams' earnings were discovered by an Internal Revenue Agent or in the course of a tax audit, '"the matter would have been handled in the Civil Division." The facts in this case show that this matter was discovered in the course of Ms. Adams' testifying falsely concerning her income tax returns for 1977 and 1978 in a deposition in which Gosnell participated, Therefore the opinion of Gipson is immaterial because his supposition was not the case.

Affidavit of Charles A. Dixon

Another affidavit that was discussed by the Court of Appeals on page 1144 of 870 F,2d was the affidavit of Charles As Dixon which accompanied the Motion to Dismiss, No discovery was obtained from him by the defendants during the discovery period. At one point, the attorney for the defendants indicated that the defendants could not establish the whereabouts of Dixon and thought that the government should determine his whereabouts. Insofar as this was a request to the Court, it was denied because Dixon was located pretrial for purpose of the affidavit which accompanied the Motion to Dismiss. Furthermore there was no explanation of what attempts had been made to find him by the defendants. The record including a portion of the evidentiary hearing causes this Court to discredit and give considerably less weight to the contents of the affidavit.

The Court of Appeals noted that Dixon stated in his affidavit that he was aware of the existence of various confidential memoranda from the Head Attorney regarding the government's investigation of Alayne Adams and was also aware of contacts between DOJ and Constance L. Dupre, Director of EEOC's Office of Legal Counsel. He further opined that he was familiar with the complaint of Adams against the EEOC which had been directed primarily at the actions of the Head Attorney.

The final paragraph of the affidavit stated that Dixon believed that the EEOC had instigated and pushed the investigation and prosecution of Adams in revenge for the institution of the discrimination proceedings. The affidavit concluded with a purported quotation from a confidential EEOC memorandum to the effect that the initiated tax investigation was 'probably as a result of the Justice Department being informed by Constance Dupre, Director of EEOC Legal Counsel." The affidavit also included Dixon's opinion that the Head Attorney had a reputation for being unfair and vindictive towards people who cross him such as Adams.

The affidavit exclusively places the vindictiveness on officials of the EEOC and particularly the Head Attorney. As noted previously herein, counsel for the defendants at the commencement of the evidentiary hearing conceded that the Head Attorney was not the alleged vindictive prosecutor. Furthermore, there was no proof to support that Constance Dupre had been the vindictive prosecutor.

The record in the evidentiary proceedings includes a deposition of Walter S. Grabon who became District Director of the Memphis Office of EEOC in March 1985. Dixon worked under him for approximately a year and a half until Dixon retired. He found the work performance of Dixon erratic and far from the level of competence to be expected. Grabon rated him in his performance evaluation as a 1 which was the lowest of the unsuccessful rating. Although Dixon did perform adequately on some occasions, his overall performance was unacceptable. Grabon testified on one occasion that Dixon threatened him and told him if he did not leave Dixon alone, Dixon was going to shoot him. Grabon further testified that he was considering terminating Dixon at the time he retired. By way of redirect examination in the discovery deposition, Ms. Caldwell asked him if Charles Dixon although inept wasn't "basically a friendly, outgoing

and sincere person." To which Dixon replied he thought he was generally friendly and outgoing, but he had "some question about his sincerity." In the total circumstances, the Court finds that the affidavit of Dixon is of little or no weight in the resolution of whether or not Gosnell acted with a realistic possibility of vindictiveness.

Summary Conclusion

This Court concludes that discovery was allowed to the defendants to the extent directed by the Court of Appeals in its opinion and even beyond to the extent that the discovery was not confined "to the narrow issue of whether the EEOC, acting on an improper motive, induced the Department of Justice to institute a prosecution that would not otherwise have been undertaken." This Court allowed broader discovery even though defense counsel acknowledged that the Head Attorney and EEOC officials were not the vindictive prosecutors. The Court conducted a three-day evidentiary hearing in order to have the record reflect all of the evidence that the defendants could find and determine whether or not the "some evidence" of vindictive prosecution that was presented to the Court of Appeals was adequate to require a dismissal of the indictment under the doctrine of vindictive prosecution. Without making a formal determination that the full discovery established a *prima facie* showing of "a realistic likelihood of vindictiveness," the Court proceeded with an evidentiary hearing. The Court has concluded that there has not been a showing of a realistic likelihood of vindictiveness and therefore the Motion to Dismiss should be and is hereby dismissed.

ENTER: This 8th day of April, 1993.

/s/ Robert M. McRae
ROBERT M. McRAE
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA

vs. No. 86-20083

ALAYNE BARRY ADAMS and
MAYO L. COINER,

Defendants.

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ORDER SETTING EVIDENTIARY HEARING

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This criminal case is before the Court after being remanded by the United States Court of Appeals for the Sixth Circuit "for further proceedings on the question whether the prosecution of Ms. Adams and Mr. Coiner for making false tax returns was based on improper motives." *United States v. Adams and Coiner,* 870 F.2d 1140, 1148 (6th Cir. 1989). The primary purpose of the remand was to direct this Court to see that the defendants received the discovery that they were entitled to on the issue of whether the government's decision to prosecute was tainted by improper motivation, namely prosecutorial vindictiveness. The Court was directed to let the defendants find out how the unusual prosecution in this case came about while not letting the discovery get out of hand. The Court further indicated that there would be time enough for this Court to consider whether an evidentiary hearing should be held after discovery had been completed.

After delays for various reasons, the discovery was completed, and the Court conducted a non-evidentiary hearing in order to let the defendants and the United States argue and

advocate their respective positions as to whether or not an evidentiary hearing should be held.

At that hearing understandably the government argued forcefully that no evidentiary hearing was necessary for the Court to determine that there had been no retaliatory indictment. On the other hand, the defendants forcefully argued there was need for an evidentiary hearing so that proper proof could be presented to support a dismissal of the indictment and the conviction that ensued from it after a jury trial. The Court took the matter under advisement in order to give further consideration to the charge that the Court of Appeals gave this Court in its opinion. Because some of the evidentiary material referred to in the Court of Appeals opinion was relied upon in order to explain the entitlement to discovery as opposed to admissible evidence on the issue of improper prosecutorial motives, the Court has determined that an evidentiary hearing with witnesses subject to cross-examination is necessary to resolve the issues presented to this Court.

IT IS THEREFORE ORDERED that an evidentiary hearing on the issues raised by the Motion to Dismiss Indictment Due to Retaliatory Prosecution filed on July 3, 1986 will be commenced at 9:30 a.m. on Monday, November 16, 1992, in Courtroom M-2, Room 933, Clifford Davis Federal Building, Memphis, and continuing thereafter from day-to-day until completed. One week prior thereto on Mondays November 9, in the Court's chambers adjacent 343 to Courtroom M-2, there will be conducted at 1:30 p.m. a prehearing conference at which time a prehearing order will be decided upon by the Court and entered.

Although the Motion to Dismiss asserts that the criminal investigation and resulting indictment were brought about "in retaliation because of the exercise of Ms. Adams' first

amendment rights of petitioning the Court for redress of grievance against the government, that is, her complaint and suit against the government," the Court does not consider that it is necessary for the defendants to establish that Ms. Adams was in fact asserting a first amendment right. The defendants in their original memorandum in support of the Motion to Dismiss discuss "bad faith prosecutions," "prosecutorial vindictiveness" and "selective prosecutions"; however, the Court is persuaded that the Court of Appeals intended this to be determined upon the vindictive prosecution principles of law with an actual retaliatory motivation as referred to in such cases as *Blackledge v. Perry*, 417 U.S. 21 (1974), and *United States v. Andrews*, 633 F.2d 449 (6th Cir. 1980, *en banc*).

The nature of the evidentiary proof shall be by witnesses appearing in person or by deposition at which both parties were in attendance and represented. Evidence in the form of exhibits shall be admitted and received for consideration subject to the Federal Rules of Evidence. The subpoena power applicable in criminal cases Is applicable to this hearing.

All prior portions of the record and the portions of the Court of Appeals opinion which are directed solely to the perjury 344 counts of the indictment charging Alayne Adams with violations of 18 U.S.C. §1623 shall not be considered relevant to this hearing.

Prior to the prehearing conference, the attorneys for the parties or either of the defendants acting as attorneys shall prepare a proposed order which shall set forth (1) the primary legal authorities to be relied upon at the hearing; (2) a list of the witnesses who will be offered in person and a separate list of those whose depositions will be offered; (3) a list of the exhibits to be offered including but not limited to business records, memoranda containing alleged admissions

against interest and federal regulations and guidelines; (4) any applications for the entitlement to rely upon any affidavits so that opposing counsel can object and the Court can rule upon them at the conference; (5) any proposed motions in limine shall be indicated on the proposed order and any other items to be considered by the Court at the prehearing conference.

A copy of this order shall be sent to Bill Barnett, representing the United States, Kathleen Caldwell, attorney for the defendants, and the defendants Alayne Adams and Mayo Coiner at their home or office address. If the defendants wish any other attorneys who have appeared in their behalf from time to time to be notified, the responsibility shall be imposed upon Ms. Adams and Mr. Coiner.

The Court will entertain closing argument at the end of the proof; however, the Court intends to take the matter under advisement and issue a written opinion as soon as possible reserving the right to ask counsel to prepare partial or total proposed findings of fact and conclusions of law.

ALL OF THE ABOVE IS SO ORDERED.

ENTER: This 7th day of October, 1992.

/s/Robert M. McRae
ROBERT M. McRAE
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA

vs. No. 86-20083

ALAYNE BARRY ADAMS and
MAYO L. COINER.

Defendants.

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RULING ON MOTION FOR
DISQUALIFICATION OF JUDGE ROBERT M. McRAE

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This matter is before the Court and more particularly Senior Judge Robert M. McRae (hereinafter the Trial Judge), who was assigned and tried this criminal case.

The case commenced with the return of a five-count indictment. Count 1 charged Alayne B. Adams and Mayo L. Coiner with willfully making and subscribing a U. S. income tax return for the year 1977 which was verified by a written declaration that it was made under the penalties of perjury and which Alayne B. Adams and Mayo L. Coiner did not believe to be true as to every material matter because the return stated that the occupation of the defendant Adams was "wife" and did not report income which Adams had received from the private practice of law, whereas Adams and Coiner well knew that the occupation of Adams had been a practicing attorney from which she had received income.

Count 2 charged a separate crime based upon the same

allegations except it was based upon their joint income tax return for 1978.

Counts 3, 4 and 5 charged the defendant Adams with three separate violations of the crime of perjury under 18 U.S.C. 1623 based upon her testimony under oath in a deposition and as a witness in a hearing before one of the magistrates in the Western District of Tennessee, pertaining to the civil case, *Adams v. EEOC*, 81-2578. That case was an employment discrimination suit filed by Adams as an attorney employed by the EEOC. The Trial Judge herein had nothing to do with that civil case.

The attorney for the defendants in this criminal case filed a Motion to Dismiss the indictment on the ground that the prosecution had been initiated in retaliation for the sex discrimination suit the defendant Adams had filed against the EEOC. As heretofore indicated, Adams and Coiner are married to each other.

The Trial Judge denied the application of the defendants for discovery beyond Rule 16, Fed. Rules of Crim. Procedure, on the retaliation claim. The motion to dismiss was heard on affidavits without holding an evidentiary hearing with proof offered through witnesses testifying subject to cross-examination. The Trial Judge dismissed the motion, and the case went to trial. The jury returned verdicts of guilty as to both defendants on Counts 1 and 2. On Counts 3, 4 and 5, the sole defendant Adams was found guilty as charged.

Standard instructions were Given to the jury. These included an instruction that all of the crimes charged required proof beyond a reasonable doubt that the defendants made false statements which he or she knew to be untrue under the penalties of perjury or under an oath to tell the truth. The jury was further instructed that the proof must establish beyond a

reasonable doubt that the defendant being considered acted with criminal intent. With regard to all five counts, the Trial Judge instructed the jury that they were not to consider the materiality of the alleged untrue statements because that is matter for the Court under the law. Therefore the jury unanimously found that both defendants lied under the penalties of perjury in the matter of the crimes charged in Counts 1 and 2. In the matter of Counts 3, 4 and 5, the jury unanimously found that Adams had lied under oath three times.

The convictions were appealed, and the Court of Appeals remanded and reversed in part. *United States v. Adams*, 870 F.2d 1140 (6th Cir 1989). The conviction of the defendant Adams of perjury in Counts 3, 4 and 5 was reversed because the Court of Appeals concluded that the trial judge erroneously determined that the untruths stated by the defendant Adams were material to the proceedings in which the testimony was given.

In the matter of the convictions of both defendants in Counts 1 and 2, the Court of Appeals held that the case should be remanded for further proceedings on the pretrial motion of both defendants that the indictment should have been dismissed on the "ground that the prosecution had been initiated in retaliation for a sex discrimination suit that Ms. Adams had filed against the United States Equal Employment Opportunity Commission." The Court concluded "that this is one of those rare cases where the defendants are entitled to discovery on the issue of whether the government's decision to prosecute was tainted by improper motivation." 470 F.2d at 1141.

The Court of Appeals gave explicit remand direct ions to the district court as follows:

> It will be time enqugh for the district court to consider whether an evidentiary hearing should be held after discovery has been completed — and we are confident that the district court will not let the discovery get out of hand. Discovery should be confined to the narrow issue of whether the EEOC, acting on an improper motive, induced the Department of Justice to institute a prosecution that would not otherwise have been undertaken. 870 F.2d at 1146.

Neither the reversal of the perjury counts against the defendant Adams nor the remand of the false income tax return counts were based upon any error pertaining to the factual issues submitted to the jury. In fact, the Court of Appeals afirmed the Trial Judge upon the defendant's appeal for a new trial upon "the allegedly erroneous evidentiary rulings made by the District court." On this appellate issue, the Court of Appeals stated:

> having read the transcript in its entirety, we are not persuaded that a new trial would be warranted. On the whole, the defendants were given ample opportunity so get their story across to the jury. 870 F.2d at 1146.

Attempted efforts by the attorneys for the United States to obtain a review or reconsideration of the ruling of the Court of Appeals set forth in 870 F.2d 1140, were unsuccessful. When this was made known to the Trial Judge, a conference was scheduled in order Or the Court to prescribe the scope of and time for the discovery and the procedural methods of complying with the directions of the Court of Appeals, to grant and restrict discovery in order to determine if an evidentiary hearing would be necessary. This conference was considered to be similar to a Scheduling Conference conducted by the Court in civil cases pursuant to Rule 16(b) of

the Rules of Civil Procedure. This Trial Judge has followed the practice of handling such conferences informally in chambers, in the courtroom or over- the telephone, and preparing and filing an order which sets forth the matters decided by the Court at the conference.

The Scheduling Conference in this case was held on July 28, 1989, in the Court's chambers with the Trial Judge presiding. In attendance for the United States was Sidney Alexander, an Assistant United States Attorney, who had no previous involvement with the trial or appeal of this case. He was assigned the proceeding to avoid a possible conflict by Devon Gosnell, the Assistant United States Attorney who tried the case in the district court and argued it before the Court of Appeals. Kathleen L. Caldwell, the attorney who argued the case for the defendants in the Court of Appeals was given notice and attended the conference for the defendants. She brought with her Joseph L. Patterson, an attorney who had not appeared in the case previously.

The Court made certain remarks and observations in the light of the Court of Appeals remand directions pertaining to the narrow issue" for discovery. Mr. Alexander and Ms. Caldwell spoke to the time and nature of discovery, and Ms. Caldwell indicated that it was her intention to file a motion to disqualify Hickman Ewing, the United States Attorney for this district, and all of his Assistant U. S. Attorneys from representing the United States in further proceedings in this case.

After the matters scheduling the discovery were completed, Mr. Patterson asked if a *nolle prosequi* might be entered. Because the question was beyond the subject matter of the conference and because Mr. Patterson had not appeared in any phase of the case, the Trial Judge undertook to explain why in his opinion the United States would not enter a *nolle prosequi.*

After the conference was adjourned, the Trial Judge caused to be filed on August 4, 1989, a Scheduling Order which prescribed the discovery procedures and ordered that "all motions such as motions to disqualify attorneys shall be filed without unnecessary delay." No motions to disqualify attorneys have been filed, but a Motion for Disqualification of Judge Due to Bias or Prejudice Pursuant to 28 U.S.C. 144 (the Motion) was filed on August 31, 1989, in behalf of both defendants.

The Motion merely states that the separate affidavits of the defendants filed with the Motion as required by 28 U.S.C. §144 show that Robert M. McRae has a personal bias or prejudice against them; therefore, he should proceed no further in the case and another judge should be assigned the case. The Motion is signed by Kathleen L. Caldwell and Joseph L. Patterson, as attorneys for the defendants. The affidavit of each party is accompanied by a certificate of the attorney that the affidavits are made in good faith.

The affidavits contain five numbered paragraphs. The typed contents of each is identical, except in the caption and in the spaces where the name of the affiant is typed by a word processor, the name Alayne B. Adams or Mayo L. Coiner is inserted respectively. In the separate affidavit of Adams, the affiant has made and initialed an interlineation in paragraph 5. The affidavits appear to be printed from the word processor or computer an which the attorneys' memorandum and the Motion were printed.

Numbered paragraph 1 states, "I am a defendant" in the case. In numbered paragraph 2, the affiant states, "I am informed and believe and based on such" allege that Robert M. McRae "has a personal bias and prejudice against me." Paragraphs 3 and 4 refer to the defendants in the third person and state the following:

3. The facts and the reasons for the belief that such bias and/or prejudice exist are that on Friday, July 28, 1989, Judge McRae conducted a status conference on this cause following the reversal and remand of the action from the Sixth Circuit. In attendance at that conference were Sidney Alexander, Assistant United States Attorney, and Kathleen L. Caldwell and Joseph L. Patterson. Counsel for Defendants

4. During that conference, Joseph L. Patterson suggested that due to the amount of suffering which the Defendants had already experienced, it would seem appropriate that a noble prosequi would be in order. Judge McRae's response was to the effect that he would not entertain a nolle prosequi even if the government presented one. Further, Judge McRae stated that the Defendants had lied and should suffer for the rest of their lives for that. Furthermore, Judge McRae stated that the reversal of Ms. Adams' convictions for perjury was based upon a mere technicality, that she was still a liar, and that they (Ms. Adams and Mr. Coiner) were still guilty.

Law Applicable

The statute, 28 U.S.C. §144, relied upon by defendants in their Motion states in pertinent part:

> Whenever a party to any proceeding in a district court makes a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias and prejudice against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists....

The affidavit referred to in the statute may be on information and belief, *Berger v. United States*, 255 U.S. 22 (1921). Although there is a reference to "such judge" proceeding no further, the case law authorizes and directs that "such judge" make the determination of the legal sufficiency of the affidavit. *United States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978). In doing so, such judge shall treat the facts of the affidavit as true. *Hodgson v. Liquor Salesmen's Union,* 444 F.2d 1344 (2nd Cir. 1971). Furthermore, the Court in *Hodgson* held that the fact that the affidavits were based entirely upon hearsay, as these were, may be taken into account in judging the sufficiency of the affidavit. Also, it has been held that consideration may be given to whether quotations of the judge were taken out of context. *United States v. Birrell*, 276 F. Supp. 798 (S.D. N.Y 1967).

The affidavit of the parties must allege facts which, if true, would convince a reasonable person that personal bias exists. *Chitimacha Tribe of La. v. Harry Laws Co.. Inc.*, 690 F.2d 1157 (Sth Cir. 1982); *U.S. v. Baker,* 441 F. Supp. 612, 616 (M.D. Tenn. 1977).

The alleged bias or prejudice must be personal and not judiciary *Oliver v. Michigan State Bd. of Education*, 508 F.2d 178, 190 (6th Cir. 1974), citing *Knapp v. Kinsev*, 232 F.2d 458, 466 (6th Cir. 1956). In *United States v. Baker,* supra at 441 F. Supp. 516, the court said:

> Moreover, the defendant must establish that the alleged bias and prejudice is personal stemming from an extra-judicial source and resulting in an opinion on the merits other than what the judge has learned from his participation in the case..

In *United States v. Azhocar*, supra at 739, the court held that the denial of a recusal motion by the trial judge for legal insufficiency" was proper even though the affidavit reflected that the judge had said he would not believe anything the defendant testified'_— to no matter what he said. The actual words were, "I wouldn't'- believe [defendant] if he said [it] on a stack of Bibles. Fn. 5, 581 F.2d 739.

In *United States v. Hanrahan*, 248 F. Supp. 471, 477 (D. D.C. 1955), the Court held that statements that the Court believed that the defendants were guilty of the crime for which they has been indicted and that he did not believe the testimony of the defendants as witnesses, were legally insufficient to support an affidavit of bias and prejudice.

If the affidavit is legally insufficient, the accused judge is under a duty to deny the motion to disqualify. *Hodqson v. Liquor Salesmen's Union*, supra, 444 F.2d at 1348.

In *Commonwealth of Pa. v. Local U.* 542, 388 F. Supp. 155, 159 (E.D. Pa. 1974), the accused judge held if the motion did not warrant disqualification, he was "not only permitted to continue to preside over the case, [he] had an affirmative duty not to withdraw."

In *United States v. Birrell*, supra, at 809 (S.D. N.Y. 1967), Judge Herlands said:

> It is the trial judge's duty to prevent a defendant from utilizing an affidavit of prejudice for the sole purpose of delaying and otherwise unjustifiably embarrassing the administration of justice.

## Conclusion

In this case, all of the facts and reasons set forth in the

affidavits are based upon comments of the Trial Judge made in response to a suggestion of attorney Patterson in a non-public conference called pursuant to the remand directions of the Court of Appeals. The factual allegations of the affidavits of the parties are based upon the oral account of their attorneys or one of them to the defendants and of necessity had to set forth the response of the Trial Judge to attorney Patterson's suggestion in a "to the effect" fashion rather than the precise words which were not available due to the lack of a court reporter being present. Therefore the total circumstances of the alleged offending remarks are not included in the affidavits.

It appears that the bias is based primarily upon the Trial Judge having allegedly used the words "mere technicality" when referring to the reversal of Adams' conviction of three counts of perjury and that both defendants had "lied" and were guilty." See paragraph 5 of both affidavits.

The Trial Judge did not include paragraph 5 in the above account of the factual contents of the affidavits because it appears that paragraph 5 sets forth opinion and alleged reasons for the bias as opposed to the facts set forth in paragraphs 1 through 4. Paragraph 5, as prepared for execution by both defendants, has two sentences. It reads as follows:

> 5. Ms. Adams and Mr. Coiner have further challenged their convictions on the basis of selective prosecution and the Sixth Circuit has also held that they stated a prima facie case of selective prosecution prior to their earlier trial and were entitled to discovery and a full hearing on that issue, which they did not receive prior to their earlier trial. It would seem obvious that their allegations of selective prosecution, now before the court again, are simply another "mere technicality" being asserted by two "guilty" "liars "

The first sentence appears to be a statement that prefaces the second sentence as the argument for a finding of bias. While the first sentence is substantially accurate in setting forth the reason that the matter is before the Trial Judge, it inaccurately expresses the opinion that the Court of Appeals held in its remand opinion that the defendants are entitled to discovery and a full hearing on the selective prosecution issue. Whereas the Court of Appeals stated: "It will be time enough for the district court to consider whether an evidentiary hearing should be held after discovery has been completed." 870 F.2d at 1146.

In the second sentence of paragraph 5, it appears that the person who prepared the typed draft was indulging in some ironical sarcasm, because he or she did not literally mean to assert that the allegations of selected prosecution by the affiants are truthfully a "mere technicality" asserted by Adams and Coiner who have been found guilty of being liars by the jury. In an attempt to remove the sarcastic overtone, Adams interlined as follows:

> It would seem obvious that their allegations of selective prosecution, now before the court again, in the opinion of the court ABA are simply another "mere technicality" being asserted by two "guilty" "liars."

The Trial Judge concludes that a reasonable person would find that a personal bias has not been shown after considering the allegations of the affidavits true but in the proper context of the total circumstances at the time of the remarks made by the Trial Judge at the Scheduling Conference on July 28, 1989. The total relevant circumstances and context of the Trial Judge's remarks were in effect as set forth below.

When attorney Patterson brought up the suggestion that a *nolle prosequi* would be in order, it was in the form of a question whether a *nolle prosequi* might be taken. Therefore the Trial Judge undertook to answer the question because the Assistant U. S. Attorney present had not participated in the trial or appeal, nor had attorney Patterson.[1]

Both defendants and every attorney at the conference, with the possible exception of Joseph L. Patterson, knew that the words "mere technicality," which were relied upon as a basis of a showing of a personal bias against Adams, referred to a conclusion by the Court of Appeals, that the Trial Judge had erroneously determined as a matter of law that the lying under oath of Adams was not punishable even though the jury made a finding that she was guilty of being a liar under oath. Similarly both defendants were found guilty of lying under the penalties of perjury with criminal intent in the tax counts. The jury findings of guilty to lies by both defendants were found even though the Court of Appeals held that there was no basis to grant a new trial because "John the whole, the defendants were given ample opportunity to get their story across to the jury."

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[1] A *nolle prosequi* is a formal entry upon the record by a prosecuting officer in a criminal action by which he declares that he "will no further prosecute" the case. Black's Law Dictionary 3rd Ed.

At the time of the remand, the defendant Coiner stated publicly that he and his wife had been vindicated, and the United States Attorney stated that he was desirous of proving in court that his office had not initiated this case in furtherance of an improper motive. Therefore it was unlikely that he would withdraw the tax prosecutions in the face of a remand in order to have a further investigation of "some evidence" in the record of vindictive prosecution.

Both the defendants are members of the bar of Tennessee and this court which makes the act of lying under the penalties of perjury or under oath particularly reprehensible and even more so for Mayo L. Coiner who has the additional responsibility for integrity and respect for the law as a professor of law students. The Trial Judge did say that Ms. Adams would have to live with the finding announced in 870 F.2d 1140 that she had been found guilty by a jury beyond a reasonable doubt of lying under oath and that finding was made after a fair trial as to all matters which could have affected the jury's verdict even though her conviction was set aside for a non-jury reason. This very well could be considered a blemish on her character for the rest of her life if a thorough investigation is made for a legal or judicial appointment, a certificate or moral fitness, her reputation for truthfulness or any other similar reason.

In addition to the unresolved attack by the defendants upon the prosecutor for the alleged improper motive, at the time that attorney Patterson requested the *nolle prosequi*, his co-counsel Kathleen Caldwell had stated at the commencement of the conference that the discovery authorized by the Court of Appeals would have to be delayed so that a motion to disqualify the United States Attorney for this district and all of the attorneys on his staff from further proceedings in this case could be filed.

Query: Is it reasonable to think that the United States Attorney for this district would *nolle prosequi* this case without further proceedings and thereby risk having the defendants claim that the taking of a *nolle prosequi* was an admission by the United States Attorney that he or any member of his staff acted improperly in the presentation of this matter to the grand jury and subsequent prosecution of the case?

After treating the factual allegations of the affidavit as being the truthful account of the words used by the Trial Judge and placing them in the proper context, the Trial Judge concludes that affidavits filed in this case are not "sufficient" to establish that Robert M. McRae, the Trial Judge, has a personal bias and prejudice against either Alayne B. Adams or Mayo L. Coiner or both.

IT IS THEREFORE ORDERED that the proceedings shall not be assigned to another judge and the attorneys for Adams and Coiner shall file the Motion to Disqualify Attorneys within ten days, if one is to be filed. The discovery as prescribed in the Scheduling Order filed herein shall be commenced as soon as possible based upon the determination of who shall represent the United States in these proceedings.

IT IS SO ORDERED.

ENTER: This 21st day of September, 1989.

/s/ Robert M. McRae
ROBERT M. McRAE
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA
Plaintiff,

vs

Cr. NO. 86-20083
Judge McRae

MAYO L. COINER and
ALAYNE B. ADAMS
Defendants.

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MOTION FOR DISQUALIFICATION OF JUDGE
DUE TO BIAS OR PREJUDICE
PURSUANT TO 28 U.S.C. SEC. 144

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Defendants, Alayne B. Adams and Mayo L. Coiner, file herewith their affidavits, as required by 28 U.S.C. Sec. 144, to show that the Honorable Robert M. McRae has a personal bias or prejudice against them.

Based thereon, Defendants respectfully move that the Honorable Robert M. McRae proceed no further herein and that another judge be assigned to hear this proceeding as required by law.

Respectfully submitted,
*/s/ Kathleen L. Caldwell*
KATHLEEN L. CALDWELL
ATTORNEY FOR DEFENDANTS
707 Adams Avenue
Memphis, TN 38105
901-525-8601

*/s/ Joseph L. Patterson*
JOSEPH L. PATTERSON
ATTORNEY FOR DEFENDANTS
1440 Poplar Avenue
Memphis, TN 38104
901-276-2792

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served, by prepaid first class mail, a copy of the foregoing Motion on:

( ) Sidney Alexander
Assistant United States Attorney
169 N. Main
Memphis, TN 38103

This the 31st day of August, 1989.

*/s/ Kathleen L. Caldwell*
KATHLEEN L. CALDWELL
Certifying Attorney

CERTIFICATE OF ATTORNEY

We, Kathleen L. Caldwell and Joseph L. Patterson, attorneys for Defendants in the above matter, hereby certify that the facts act forth in the accompanying Affidavits in Support of Motion to Disqualify Judge for Bias or Prejudice Pursuant to 28 U.S.C. See. 144 are true and correct to the best of our knowledge, information and belief, that the Affidavits were made in good faith by the Defendants, and that the Affidavits and Motion are filed in good faith by the Attorneys for the Defendants.

*/s/ Kathleen L. Caldwell*
KATHLEEN L. CALDWELL

*/s/ Joseph L. Patterson*
JOSEPH L. PATTERSON

answered .

(1 ) Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the act which provides for the filing of affidavit of prejudice of a judge, to which the Court responded:

> "We are of opinion therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to proceed no further in the case." 255 U.S. at 35, 41 S. Ct. at 233.

(2) Did said Judge Landis have the lawful right to pass the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit to which the Court responded:

> Nor is it our function to approve or disapprove it [2S U.S.C. Section 144], but, we may say, that its solicitude is that the tribunals of country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the sections from any bias or prejudice that might disturb the normal course of impartial Judgment. And to accomplish that end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Its explicit declaration is that upon the making and filing of the affidavit, the judge against whom it is directed shall proceed no further therein, but another judge shall be designated in the manner prescribed in * * * section twenty-three to hear such matter. And the

> reason is easy to divine. To commit to the judge a decision upon the truth of the fact gives chance for the evil against which the section is directed. 255 U.S. at 35-36, 41 S. Ct. at 234.

(3) Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said judge have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment? To which the Court responded: